



October 5, 2000

Ms. Linda Henry
Counsel
Port of Houston Authority
P.O. Box 2562
Houston, Texas 77252-2562

OR2000-3841

Dear Ms. Henry:

You ask whether certain information is subject to required public disclosure under Chapter 552 of the Government Code. Your request was assigned ID# 139519.

The Port of Houston Authority (the "PHA") received a request for 38 items of information relating to the proposed Bayport Container Port (the "Port"). You inform us that information responsive to item 35 of the request was the subject of a prior ruling from this office. Based on your representation that the circumstances addressed in that ruling have not changed, we conclude that you may continue to withhold the information responsive to item 35 in accordance with Open Records Letter No. 2000-1197 (2000). *See* Gov't Code § 552.301(a) (providing that governmental body must ask for a decision unless there has been a previous determination about whether the information is excepted from disclosure). You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.105, and 552.107 of the Government Code. You state that you are releasing all other responsive records that exist. We have considered the exceptions you claim and reviewed the submitted representative samples of information.¹

You assert that Exhibit G, which is responsive to items 7, 8, 10, 11, 14, 17, 18, 19, 20, 21, 30, 32, and 34, is excepted under section 552.103 of the Government Code. Section 552.103(a) provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information from that submitted to this office.

employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991). Further, litigation must be pending or reasonably anticipated on the date the requestor applies for access. Gov't Code § 552.103(c). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). You provide documentation that a potential opposing party of the Port has hired an environmental attorney with substantial experience in litigation of the type you anticipate. Further, this attorney has told PHA's attorney of his intent to sue PHA. You have also provided a newspaper article in which the attorney states that he has plans to litigate against PHA under various environmental statutes and the Texas Constitution. Thus, we conclude that you have demonstrated that litigation is reasonably anticipated and that the information in Exhibit G which pertains to the Port relates to the anticipated litigation.²

However, we note that the some of the submitted documents must be released pursuant to section 552.022 of the Government Code. Section 552.022(a) provides in pertinent part:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(3) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

²We also note that this office determined that PHA reasonably anticipated litigation in Open Records Letter No. 2000-1197. ORL 2000-1197 at 4.

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]

Section 552.103 is a discretionary exception under the Public Information Act and is, therefore, not "other law" that makes the submitted information confidential. *See* Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body's position in litigation and does not itself make information confidential). We believe that the submitted information in Exhibits G-7 and G-34 are "completed reports" made for PHA and are, therefore, public under section 552.022(a)(1). Further, the submitted information in Exhibits G-18 and G-20 contains estimates of the expenditures of public funds which are public under section 552.022(a)(5). Thus, you must release Exhibits G-7, G-18, G-20, and G-34 under section 552.022(a). You may withhold the remaining information in Exhibit G under section 552.103.

We note that if the opposing party in the litigation has seen or had access to any of the information in these records, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). Further, section 552.103 does not authorize the withholding of information which has already been made available to the public. Open Records Decision No. 436 (1986). We note that the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982), Open Records Decision No. 350 (1982). However, if the records contain information that is confidential by law, you must not release such information even at the conclusion of the litigation. Gov't Code §§ 552.101, .352.

You also assert that Exhibits I and J, which are responsive to items 2 and 26 of the request, are excepted under section 552.107(1). Section 552.107(1) excepts information that an attorney of a political subdivision cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. In addition, purely factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.*

You explain that the information in Exhibits I and J was prepared by PHA's outside counsel. After reviewing the submitted information, we agree that the information consists of legal advice and opinion. Therefore, you may withhold Exhibits I and J under section 552.107(1) of the Government Code.

Further, you claim that information in Exhibits K and L, which are responsive to items 6 and 31 of the request, may be withheld under section 552.105 of the Government Code. Section 552.105 excepts from required public disclosure information "relating to"

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Because this exception protects a governmental body's planning and negotiating position with respect to particular transactions, its protection is limited in duration. Open Records Decision No. 357 (1982). To show the applicability of section 552.105, a governmental body must first make a good faith determination that the release of the information could damage its negotiating position with respect to the acquisition of property, subject to review by this office. Open Records Decision No. 564 (1990). Section 552.105(1) is generally inapplicable when the governmental body has publicly announced the project. Likewise, section 552.105(2) is generally inapplicable once the governmental body has entered into a final contract for the property at issue. Open Records Decision No. 222 (1979). You state that PHA has neither made a final decision as to the entire project location nor acquired all of the property for the project. Thus, section 552.105 remains applicable.

When section 552.105 is applicable, it protects not only information showing the location of property, appraisal reports specific to that property, and the purchase price of the property, but also related information. Open Records Decision No. 564 (1990). After reviewing the information at issue and your arguments, we agree that you may withhold Exhibits K and L under section 552.105 of the Government Code.

You also assert that Exhibit M, which contains a certified agenda of an executive session and is responsive to item 23, is excepted under section 552.101. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 551.104(c) of the Government Code provides that "[t]he certified agenda or tape of a closed meeting is available for public inspection and copying *only under a court order issued under Subsection (b)(3).*" (emphasis added). Thus, such information cannot be released to a member of the public in response to an open records request. See Open Records Decision No. 495 (1988). Therefore, we agree that you must withhold the certified agenda of the executive session in Exhibit M under section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code.

In conclusion, you may withhold the information in Exhibit G under section 552.103 with the exception of Exhibits G-7, G-18, G-20, and G-34, which must be released under section 552.022(a). You may withhold Exhibits I and J under section 552.107 and Exhibits K and L under section 552.105. Further, you must withhold Exhibit M under section 552.101.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

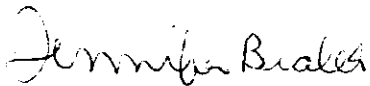
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jennifer Bialek".

Jennifer Bialek
Assistant Attorney General
Open Records Division

JHB\er

Ref: ID# 139519

Encl: Marked documents

cc: Mr. Harvill E. Weller
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(w/o enclosures)